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IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

No. 373

WALTER H. DUISBERG,
Petitioner and Appellant below,

v.

JAMES E. MARKHAM, as Alien Property Custodian,
Respondent and Appellee below.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF

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[Note: Civil Procedure Rules 41(a)(2) and 41(b) are referred to throughout the petition and brief.]

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

To the Honorable Harlan Fiske Stone, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully shows:

Statement of the Matter Involved

The Circuit Court has, upon the ground of "discretion," affirmed the District Court, which without trial dismissed with prejudice a complaint wherein plaintiff, a citizen of the United States (R. 6a, 9a),* sought to recover 1,975

* All references to appellee's appendix are by page number alone; all references to appellant's appendix are by page number followed by the letter "a."

shares of the capital stock—constituting 23% of all the outstanding capital stock (R. 53)—of General Dyestuff Corporation, a multi-million dollar corporation (R. 75a, 80a), which shares had been seized from him by the Alien Property Custodian. If the Alien Property Custodian has, in accordance with his indicated intention (R. 80a), disposed of the shares since the dismissal of this action, the only remaining issue is whether he shall be required to account to petitioner for the proceeds thereof.

This is a suit in equity, brought in the United States District Court for the District of New Jersey by Walter H. Duisberg, petitioner herein, against Leo T. Crowley (for whom James E. Markham was later substituted), individually and as Alien Property Custodian, respondent herein, under § 9(a) of the Trading with the Enemy Act [50 U. S. C. A. App. § 9], for a judgment decreeing that petitioner is the owner of 1,975 shares of the capital stock of General Dyestuff Corporation, expropriated by respondent, and directing respondent to deliver said shares of stock and the avails thereof to petitioner (R. 6a-8a).

The action was commenced on June 5, 1943 (R. 1a). Respondent made a motion to dismiss the complaint, which was granted as to respondent individually but denied as to respondent in his capacity as Alien Property Custodian (R. 1a-2a). On March 18, 1944, respondent filed his answer, which admits that petitioner is the record owner of the 1,975 shares, but denies that he is the beneficial owner thereof (R. 1a, 10a). [For reasons which hereinafter appear, the answer thus filed did not present the issues which were actually to be tried in this suit.]

Petitioner moved to strike out the first and second defenses and part of the third defense contained in the answer, and on May 3, 1944, the court entered an order granting petitioner's motion and directing that the answer be deemed amended accordingly (R. 2a, 55-57).

On May 15, 1944, petitioner served notice of motion for judgment on the pleadings; on June 5, 1944, an order was entered denying this motion upon respondent's express stipulation in open court to comply with a demand there-

after to be made by petitioner for specifications, which specifications, when filed, the court ruled would take the place of an amended answer (R. 3a, 43a, 19-21). The following day, June 6, 1944, petitioner served a demand for such specifications (R. 11a-14a), with which demand respondent complied in small part on June 9, 1944 (R. 3a, 16a-17a).

Since respondent's specifications thus filed were to stand in lieu of an amended answer, the earliest date at which it may be said that issue was joined in this action was June 9, 1944, even assuming that the specifications filed by respondent complied with his stipulation. Until that date, at the very earliest, petitioner was unable to undertake his preparation for trial, except upon the assumption that a plaintiff owes a duty to the court in which he commences an action, even prior to the joinder of issue, to prepare for trial with respect to every allegation of his complaint.

Prior to May 26, 1944, the New Jersey District Court's calendar of ready, undisposed-of cases to which the United States was a party comprised 46 cases, of which the instant action was the last (R. 129a-132a). On that date, May 26, 1944, the court, on defendant's *ex parte* application, fixed June 19, 1944, for the trial of this action (R. 3a, 108a). Judge Smith subsequently entered an order changing said trial date to June 21, 1944, peremptorily against petitioner, and further providing that if petitioner thereafter moved for a voluntary dismissal such dismissal was to be with prejudice (R. 3a, 14a-15a, 45).

The government's attorney conceded that the facts constituting the proof of the issues in this case "are extremely complex" (R. 84a). The complexity of the case was such as to require defendant to expend three months in the preparation of its motion and amended motion to dismiss the complaint and the court to expend seven months in the consideration and decision of that motion—a total of ten months (R. 1a-2a). The importance of the case and the anticipated length of the trial were such as to require the assignment of a judge from Michigan (Judge Lederle) for the special purpose of hearing this single case (R. 83a-84a,

22-24, 35-36). It was conceded that the trial would last between three weeks (defendant's estimate, R. 36) and seven weeks (plaintiff's estimate, R. 69a-70a).

Between the day when the case was lifted from its position of last case on the calendar and set down for trial, and the day when the complaint was dismissed with prejudice, twenty-six days elapsed. Between the day when issue was joined by the filing of defendant's specifications, and the day when the complaint was dismissed with prejudice, twelve days elapsed, including two Sundays. Of those twelve days, theoretically available to plaintiff for preparation for trial, eight days were consumed in defendant's examination before trial of one of plaintiff's principal witnesses and in defendant's discovery and inspection, at the offices of plaintiff's counsel, of a 24-foot pile of documents (R. 23a-25a, 49a-51a, 58, 62, 68-70).

The aura surrounding the disposition of this case—which has meant the confiscation of plaintiff's fortune—is apparent from the government attorney's attempt to create in the mind of a Michigan judge a prejudice against the insinuated dilatoriness of the New York bar (R. 80a), and from the accusations of dilatoriness levelled against plaintiff's counsel by the court, without specification (R. 44-45) and without substantiation in the record or in fact.

Plaintiff applied for a continuance in order to enable him to prepare for trial, which continuance was denied (R. 3a-4a, 84a, 90a, 138a, 142a, 143a, 153a).

Plaintiff thereupon made a motion, before Judge Lederle, under Rule 41(a)(2) for a voluntary dismissal (R. 139a, 143a).

Defendant asserted that he would be prejudiced were plaintiff's motion for a voluntary dismissal to be granted, since by virtue of § 9(a) of the Trading with the Enemy Act [50 U. S. C. A. App. § 9], the pendency of plaintiff's action operated as an injunction against disposition by defendant of the shares seized by him from plaintiff (R. 79a-80a). Plaintiff offered to obviate such prejudice by stipulating to waive the injunction (R. 74a-75a, 87a, 89a).

[In the Circuit Court of Appeals, defendant asserted, as a second ground of prejudice, that a substantial expenditure incurred by him in preparation for trial would have been lost had plaintiff's motion for a voluntary dismissal been granted (Appellee's C. C. A. brief, p. 30). No reason appears why any such prejudice could not have been obviated by the imposition of appropriate "terms and conditions," as was done in the many other cases arising under Rule 41(a)(2) cited in the accompanying brief.]

The court thereupon denied plaintiff's motion under Rule 41(a)(2) for a voluntary dismissal (R. 143a, 154a).

Defendant thereupon made a motion for an involuntary dismissal under Rule 41(b), which motion was granted by the court (R. 141a, 143a, 154a).

Judgment was thereupon entered dismissing the complaint with prejudice (R. 4a).

An appeal from said judgment and orders was taken by plaintiff to the Circuit Court of Appeals for the Third Circuit (R. 156a), which affirmed the judgment of the District Court (R. 72-74).

The questions involved on said appeal were (1) whether there had been a clear abuse of discretion by the District Court in denying plaintiff's motion for a continuance, (2) whether there had been a clear abuse of discretion by the District Court in denying plaintiff's motion for a voluntary dismissal under Rule 41(a)(2), and (3) whether there had been a clear abuse of discretion by the District Court in granting defendant's motion for an involuntary dismissal under Rule 41(b) without specifying that said dismissal was to be without prejudice,—which questions were decided by said Circuit Court of Appeals for the Third Circuit.

Jurisdictional Statement

1. The order of the United States Circuit Court of Appeals for the Third Circuit affirming the District Court's judgment was entered on May 25, 1944 (R. 74).

2. The jurisdiction of this court is invoked under § 240(a) of the Judicial Code [28 U. S. C. A. § 347].

3. The Circuit Court of Appeals for the Third Circuit has so far sanctioned a departure by the District Court from the accepted and usual course of judicial proceedings as to call for an exercise of this court's power of supervision (Supreme Court Rule 38, par. 5(b)).

Questions Presented

1. Whether it constitutes a clear abuse of discretion for a court to deny a motion made by a plaintiff prior to commencement of trial to dismiss without prejudice under Rule 41(a)(2), where no legal prejudice or damage resulting from such dismissal is shown, or where, in the alternative, the prejudice or damage resulting from such dismissal may be completely obviated by the imposition of appropriate terms and conditions.

2. Whether it constitutes a clear abuse of discretion for a court to grant a motion made by a defendant prior to commencement of trial for an involuntary dismissal under Rule 41(b), without specifying that such dismissal shall be without prejudice, where plaintiff offers to stipulate to any terms or conditions which may be necessary or appropriate to obviate completely any prejudice or damage to defendant.

3. Whether Judge Smith's order of June 9, 1944 (to the extent that it provided, although no motion had then been made by either party for such relief, that any voluntary nonsuit thereafter taken would be with prejudice) was inconsistent with known legal procedure and constituted a clear abuse of discretion.

[In the event that this court grants the within petition for a writ of certiorari, petitioner asks leave to present to this court, upon the argument of such writ, the further

question of whether there was a clear abuse of discretion in the denial of plaintiff's application for a continuance of the trial herein. Petitioner does not advance error in that respect as a reason for this application for a writ of certiorari.]

Reasons Relied Upon for Allowance of Writ

1. The discretion vested in the court by Rule 41(a)(2) is a judicial discretion, not a personal discretion. It is the intent and purpose of that rule that the discretion vested in the court shall be exercised to determine whether a motion made by a plaintiff for a voluntary dismissal before the commencement of trial may be granted without resulting in any prejudice or damage to defendant which cannot be completely obviated by the imposition of appropriate terms and conditions. If non-obviatable prejudice or damage will be caused by the voluntary dismissal, the court is invested with judicial discretion to deny the motion. If obviatable prejudice or damage will be caused by the voluntary dismissal, the court is invested with judicial discretion to determine and impose the appropriate terms and conditions. Where a plaintiff, before commencement of trial, moves for a voluntary dismissal which will cause defendant obviatable prejudice or damage, the court may not abnegate its discretion by a dismissal of the action with prejudice and without terms, since to do so is in effect to assess against a plaintiff the full value of his cause of action as compensation to defendant for what may be relatively inconsequential damages caused by the voluntary dismissal.

2. The discretion vested in the court by Rule 41(b) is a judicial discretion, not a personal discretion. Where a defendant moves before the commencement of trial for an involuntary dismissal under that rule, the court is required to exercise judicial discretion to determine whether, in the light of stipulations or terms consented to by plaintiff, the order of dismissal should specify that it shall not operate as an adjudication upon the merits. A court, in

granting a motion under Rule 41(b), may not abnegate its discretion to determine whether the dismissal shall be with or without prejudice, since to do so is in effect to penalize a plaintiff to the full value of his cause of action for what may be a default resulting in inconsequential loss or damage to defendant.

3. Any interpretation of Rules 41(a)(2) and 41(b) which sanctions penalizing a plaintiff to the full value of his cause of action for failure to proceed to trial on the day set by the court, without regard to the damage actually caused to defendant by such failure to proceed to trial, constitutes a departure from the accepted and usual course of judicial proceedings.

Prayer for Writ

Wherefore your petitioner prays that a writ of certiorari issue under the seal of this court, directed to the Circuit Court of Appeals for the Third Circuit, commanding said court to certify and send to this court a full and complete transcript of the record of the proceedings of the said Circuit Court of Appeals for the Third Circuit, had in the case numbered and entitled on its docket, No. 8730, Walter H. Duisberg, Plaintiff-Appellant v. James E. Markham, as Alien Property Custodian, Defendant-Appellee, to the end that this cause may be reviewed and determined by this court as provided for by the statutes of the United States; and that the judgment herein of said Circuit Court of Appeals for the Third Circuit be reversed by this court, and for such further relief as to this court may seem proper.

Dated: August 24, 1945.

Respectfully submitted,

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Of Counsel:
GAREY, DESVERNINE & GAREY,
RICHARD J. FITZMAURICE.

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Opinions of Courts Below

No opinion was rendered in the District Court on the disposition of this action.

The opinion rendered by the Circuit Court of Appeals for the Third Circuit, on May 25, 1945, has not been officially reported. The opinion is printed in full in the record (R. 73).

Jurisdiction

The "Jurisdictional Statement" (pp. 5-6) in the preceding petition is hereby adopted and made a part of this brief.

Statement of the Case

The "Statement of the Matter Involved" (pp. 1-5) in the preceding petition is hereby adopted and made a part of this brief.

Specification of Errors

1. The Circuit Court of Appeals for the Third Circuit erred in holding that the denial of plaintiff's motion for a voluntary dismissal under Rule 41(a)(2) was not a clear abuse of discretion by the District Court.*

2. The Circuit Court of Appeals for the Third Circuit erred in holding that the granting of defendant's motion for an involuntary dismissal under Rule 41(b), without specification that said dismissal was to be without prejudice, was not a clear abuse of discretion by the District Court.

ARGUMENT

Summary of the Argument

Petitioner believes that the District Court was grievously in error in denying petitioner's application for a continuance of the trial. But petitioner does not advance error in that respect as a reason for this application for a writ of certiorari. The questions which will here be raised are whether the District Court was in error in denying petitioner's motion for a voluntary dismissal under Rule 41(a)(2), and whether the District Court was in error in granting respondent's motion for an involuntary dismissal under Rule 41(b) without specification that said dismissal was to be without prejudice. Petitioner's position is that the District Court abnegated the judicial discretion vested

* To the extent that Judge Smith's order of June 9, 1944, provided that any voluntary nonsuit thereafter taken would be with prejudice, it is included in this specification of error.

in it when it failed to require defendant to specify all respects in which he would be prejudiced or damaged by a dismissal, voluntary or involuntary, and when it failed to determine whether such prejudice or damage could be completely obviated by the imposition of appropriate terms and conditions.

POINT I

Prior to the decision in the instant case, the District Courts had interpreted Rule 41(a)(2) as meaning that a motion by plaintiff for a voluntary dismissal before commencement of trial must be granted unless such voluntary dismissal would cause defendant legal prejudice or damage which could not be obviated by the imposition of appropriate terms and conditions.

Prior to the decision in the instant case the District Courts had interpreted Rule 41(a)(2) as imposing upon them the duty of determining whether a voluntary nonsuit before commencement of trial could be granted without causing defendant legal prejudice or damage not obviatable by the imposition of appropriate terms and conditions, and of determining what those terms and conditions should be.

The leading case is *McCann* v. *Bentley Stores Corp.*, 34 F. Supp. 234 (D. Ct., W. D. Mo. 1940), where an action had been pending for four years, and there had been an unsuccessful motion to remand, before plaintiff moved to dismiss without prejudice under Rule 41(a)(2). The court stated (pp. 234-235):

> "I consider that paragraph (2) of Rule 41(a) is one of the most valuable improvements over the old law accomplished by the new rules. * * *
>
> "When the Supreme Court promulgated this rule and provided that the court might permit a dismissal without prejudice 'upon such terms and conditions as the court deems proper' what sort of 'terms and conditions' was contemplated? I have found nothing in the

books upon which to base an answer, but *no 'terms and conditions' are conceivable except such as are calculated to compensate the defendant for the expense to which he has been put.*" [Italics ours.]

In *Welter* v. *E. I. Du Pont De Nemours & Co., Inc.*, 1 F. R. D. 551 (D. Ct., D. Minn. 1941), the action had been pending for over a year, there had been four pre-trial motions, and defendant had made extensive preparations for trial, before plaintiff moved to dismiss without prejudice under Rule 41(a)(2). The court granted the motion upon condition that plaintiff pay defendant the sum of $200. Citing the *McCann* case, the court stated (pp. 552-554):

"Under Rule 41(a)(2), Federal Rules of Civil Procedure, 28 U. S. C. A. following section 723c, plaintiff does not have the right to dismiss without consent of court. If one is to weigh the equities, it must be recognized that plaintiff will put defendants to unnecessary expense and delay without cause if the case is dismissed. No reason for dismissal now exists which did not prevail before answer was served. Rule 41(a)(2) was undoubtedly framed so as to prevent the voluntary dismissal of an action on the mere whim of the plaintiff after answer is served. Where defendants have gone to considerable trouble and expense in preparing for trial and the matter has been pending for over a year and no equities are shown or made to appear in behalf of the plaintiff's motion for dismissal, it seems evident that the court would abuse its discretion in permitting such dismissal and relegating the defendants to a few dollars by way of statutory costs. But *unless it appears that reasonable terms and conditions cannot make the defendants reasonably whole, I question that the court should deny the motion. The right to dismiss before verdict has been long recognized by our courts.* • • •

"A dismissal will result in a prejudice which is solely monetary and which can be substantially removed by plaintiff's compliance with terms and conditions as a right to a dismissal. However, if plaintiff desires now to avail himself of his right to dismiss in this court and subject defendants to another lawsuit in State Court on the same issues, he should be required to pay the reasonable costs and attorneys' fees incurred herein

by the defendants. It is fair to presume that the present rule 41(a)(2) was promulgated for that very purpose." [Italics ours.]

In *Gold* v. *Geo. T. Moore Sons, Inc.*, 3 F. R. D. 201 (D. Ct., S. D. N. Y. 1943), the action had been pending for almost one year before plaintiffs moved, *on the day set for trial,* to dismiss without prejudice under Rule 41(a)(2). The pre-trial proceedings had been most extensive, as is partly indicated by the following brief excerpt from the opinion (p. 201):

> "Since issue was joined, plaintiffs' counsel has examined an officer of defendant, pursuant to Rules 26 and 30(c), Federal Rules of Civil Procedure. Likewise Abraham Gold has been examined by defendant's attorney. Defendant's attorney states that soon after suit was brought he called counsel for plaintiffs and showed him that defendant had made the alleged infringing device nineteen months before plaintiffs claimed to have conceived the idea, but plaintiffs insisted on going on with the litigation. It therefore became necessary for defendant to prepare for trial. This involved conferences, examination of corporate records, a search of the patent office to discover the state of the prior art, examination of some nine patents, the taking of depositions, conferences with witnesses and the preparation of a trial brief."

The court noted that plaintiffs' default was a willful and intentional default on the day of trial, and that plaintiffs admittedly had had no intention of proceeding to trial in their action, which apparently was an unfounded one. Nevertheless the court felt constrained to grant their motion for a dismissal without prejudice under Rule 41(a)(2), and ruled that its only task was to determine the terms and conditions which would make defendant whole upon such voluntary dismissal. Citing the *McCann* case, the court stated (p. 202):

> "I am adding that condition because *it seems to me that plaintiffs are in effect defaulting yet wish to avoid*

> *the effect of a failure to prosecute the action, which would entitle the defendant to move for a dismissal of the action.* Under Rule 41(b), Federal Rules of Civil Procedure, such a dismissal, unless the order otherwise directed would operate as a dismissal upon the merits. * * *
>
> "At the hearing on June 8th plaintiffs' attorney stated that plaintiffs intended to drop the litigation, but he would not consent to a dismissal with prejudice. Since a dismissal under Rule 41(a)(2) is without prejudice unless otherwise specified in the order, I will grant plaintiffs' request for a dismissal without prejudice on condition that plaintiffs within ten days of the entry of the order pay defendant $327.74, as hereinabove indicated, and if said payment is not so made, the dismissal shall be with prejudice." [Italics ours.]

Even in the foregoing case where, as the court expressly noted, "plaintiffs have practically walked out on this litigation," plaintiffs were afforded an opportunity to save their cause of action by payment of $327.74.

In *United States* v. *Elm Spring Farm Co.*, 3 F. R. D. 43 (D. Ct., D. Mass. 1942), the action had been pending for a year and a half, and there had been some pre-trial motions, before plaintiff (the government) moved to dismiss without prejudice under Rule 41(a)(2). The court flatly stated the prevailing position of the District Courts, which from the viewpoint of elementary fairness and equity is the only tenable position (p. 44):

> "The defendants now insist that if the Government's motion is allowed, it should be with prejudice. *Since there has been no hearing on the merits, such a contention cannot prevail.*" [Italics ours.]

In *Ryerson & Haynes, Inc.* v. *American Forging & Socket Co.*, 2 F. R. D. 343 (D. Ct., E. D. Mich. 1942), plaintiff sued for alleged patent infringement. Defendant filed "a detailed answer to the complaint, pleading especially non-infringement and invalidity of plaintiff's patents for various reasons." Plaintiff waited until the pre-trial hearing

before moving to dismiss without prejudice under Rule 41(a)(2). The court stated (p. 343):

> *"In accordance with Rule 41(a)(2)*, it is hereby ordered that the above-entitled cause be, and the same is, hereby dismissed and discontinued without prejudice to plaintiff's rights provided that prior to the institution of another suit upon the cause of action here involved plaintiff pays to defendant all of its taxable costs and all expenses incurred by said defendant in preparation for this case, said costs and expenses to be determined by the court prior to the time such second suit is commenced." [Italics ours.]

It is of especial interest that the foregoing decision was rendered by Judge Lederle, who denied the motion made under Rule 41(a)(2) in the instant case. A reading of Judge Lederle's opinion reveals clearly that in the *Ryerson* case he proceeded upon the correct principle that his only discretion "in accordance with" the rule was to determine the terms and conditions which would make defendant reasonably whole. It will be noted, however, that the formula adopted by him for the determination of such terms and conditions represents the imposition of a *condition subsequent*. So far as is revealed in the reported cases, never before or since Judge Lederle's decision in the *Ryerson* case has a judge imposed any but a *condition precedent* to dismissal without prejudice. In the very next reported case arising under Rule 41(a)(2)—the *Mott* case, *infra* (p. 16)—the court expressly rejected Judge Lederle's "condition subsequent" formula as impractical and unduly favorable to plaintiff.

In the instant case the learned Judge, swinging full pendulum, has completely rejected the notion of conditions (whether subsequent or precedent) to a dismissal without prejudice, even though appropriate conditions could have been devised and imposed which would have completely obviated prejudice. The entire situation is clearly one of

the exercise of a personal discretion—not a judicial discretion.

Motions to dismiss without prejudice under Rule 41(a)-(2) were granted also in the following cases:

United States v. *Commercial Solvents Corp. of Del.*, 25 F. Supp. 653 (D. Ct., D. Del. 1938): action pending three years; prior unsuccessful motion by defendant to dismiss for want of prosecution; no terms imposed.

Lawson v. *Moore*, 29 F. Supp. 175 (D. Ct., W. D. Va. 1939): plaintiff required to pay the costs in the action.

Contracting Div., A. C. Horn Corp. v. *New York Life Ins. Co.*, 113 F. 2d 864 (C. C. A. 2d 1940), affirming S. D. N. Y.: action pending two years; plaintiff required to pay the costs in the action.

Taylor v. *Swift & Co.*, 2 F. R. D. 424 (D. Ct., S. D. Fla. 1942): plaintiff required to pay $258.80; citing the *McCann* case.

Mott v. *Connecticut Gen. Life Ins. Co.*, 2 F. R. D. 523 (D. Ct., N. D. Ia. 1942): defendant prepared and ready for trial; plaintiff required to pay the costs in the action plus $100; citing the *McCann* case.

McLean v. *Wabash R. Co.*, 3 F. R. D. 172 (D. Ct., W. D. Mo. 1942): no terms imposed.

Hannah v. *Lowden*, 3 F. R. D. 52 (D. Ct., W. D. Okla. 1943): plaintiff required to pay $160; citing the *McCann* case.

Derman v. *Stor-Aid, Inc.*, 7 F. R. Serv. 637 (D. Ct., S. D. N. Y. 1943): defendants incurred $12,500 expenses in preparation for trial; plaintiff required to pay $5,000.

In all thirteen cases cited *supra* (pp. 11-16), plaintiffs' motions to dismiss without prejudice under Rule 41(a)(2) were granted, despite the fact that they involved actions pending for as long as four years, actions in which there had been many pre-trial motions and extensive pre-trial proceedings, actions in which defendants had made extensive and expensive preparations for trial and were ready

and prepared for trial, and actions in which plaintiffs waited until the day of trial before moving for involuntary dismissal. The dismissals without prejudice were either without terms, or on condition subsequent (Judge Lederle's unprecedented and unfollowed decision), or on terms varying from costs in the action to a maximum of $5,000 (in an action wherein defendants had expended $12,500 in preparation for trial). In the instant action alone has a court thought it proper to penalize plaintiff in a sum approximating a million dollars for seeking an involuntary dismissal under Rule 41(a)(2). In all the other actions, plaintiff was accorded an opportunity to obviate prejudice or damage sustained by defendant as a result of the involuntary dismissal; in the instant action alone, he was not.

It is respectfully submitted that the discrepancy between the interpretation of Rule 41(a)(2) displayed in the foregoing thirteen cases and that displayed in the instant case is such as to commend to this court the necessity for an authoritative interpretation of the extent of the discretion vested in a District Court under Rule 41(a)(2).

POINT II

In granting defendant's motion for an involuntary dismissal under Rule 41(b), without specification that the dismissal was to be without prejudice, the District Court predicated its decision upon an erroneous interpretation of that rule.

Even though defendant asserted no prejudice which plaintiff did not offer to obviate by stipulation, the position of the District Court was that an involuntary dismissal under Rule 41(b) should be with prejudice. Whether the court's interpretation of Rule 41(b) was that it was *required* to dismiss with prejudice, or whether the court's interpretation of Rule 41(b) was that even though there had been no trial and no assertion of non-obviatable prejudice the court

was *empowered* to dismiss with prejudice, the court was equally in error.

In *Russo* v. *Sofia Bros., Inc.*, 2 F. R. D. 80 (D. Ct., S. D. N. Y. 1941), plaintiff's complaint had been dismissed before trial, without leave to amend, on defendant's motion under Rule 41(b). Plaintiff moved for leave to file an amended complaint. The question before the court was whether the prior dismissal under Rule 41(b), without specification whether it was with or without prejudice, operated as an adjudication on the merits. The court ruled that even though the prior order had not specified that it was without prejudice, the dismissal must, despite the language of Rule 41(b), operate as a dismissal without prejudice. The court stated (pp. 81-82):

> "It is pointed out by Professor Moore that *the objective of the new rules is to secure a disposition of litigation on the merits* rather than by collateral methods. Rule 1, F. R. C. P., dictates that the rules shall be construed to secure the just, speedy, and inexpensive determination of every action. • • •
>
> "*Clearly, there has been no trial of the issues.* • • • In other words, *objectively considered, there has been no disposition of plaintiff's claim on the merits.* Are we constrained by a fiction to so treat it by the command of Rule 41?
>
> "I have searched vainly for a judicial interpretation of its language as it affects the problem here presented. The Notes of the Reporter to the Advisory Committee on the rules read: 'Note to subdivision (b). This provides for the equivalent of a nonsuit on motion by the defendant after the completion of the presentation of evidence by the plaintiff. Also, for actions tried without a jury, it provides the equivalent of the directed verdict practice for jury actions which is regulated by Rule 50.' • • •
>
> "The compilation of data gleaned from the Symposia on the Rules under the Auspices of the American Bar Association • • • See: Proceedings of the American Bar Association Institute, Cleveland, pp. 308, 350; Washington and New York, pp. 118, 137, 156, 165 and

277. These discussions reveal the Rule in its primary function, as a device during trial to prevent the recurrence of litigation that had reached that advanced stage.

"The place that this rule occupies in the numerical order of the rules, as part of Chapter VI, entitled Trials, rules 38-53, tends to characterize it primarily as controlling the action at or after the trial.

"To extend the operation of this rule to the instant motion would, I believe, *create a penalty and a forfeiture which was not contemplated by the framers of the Rules.*" [Italics ours.]

POINT III

The District Court improperly exercised a personal discretion unrelated to any sound concept of judicial discretion, violative of the equities involved, and departing drastically from the accepted and usual course of judicial proceedings.

In the exercise of a supposed "discretion," petitioner's fortune has been confiscated. Even if petitioner were in the wrong in not obeying the order of the District Court that, on only a few days' preparation for trial after joinder of issue, he proceed to a three-to-seven week trial involving, as the government itself stated, "extremely complex" proof with respect to "the most important properties * * * monetarily" which the Alien Property Custodian had taken over in the war (R. 69a-70a, 80a, 84a, 36), only a court misled by some concept of personal discretion could have thought that the proper penalty for such an offense was the confiscation of plaintiff's fortune. A proper understanding of judicial discretion would have resulted in according greater consideration to the fact that petitioner's refusal to proceed to trial had resulted in no non-obviatable prejudice or damage to defendant, and would therefore inevitably have led to a different result.

The proper considerations to be weighed in the exercise of the discretion vested in a court under Rule 41(a)(2)

have been indicated in *Home Owners' Loan Corp.* v. *Huffman,* 134 F. 2d 314 (C. C. A. 8th 1943), wherein the court stated (pp. 316-318):

> "The effect of this rule is to confer upon the court in all civil actions the equitable power to impose upon a plaintiff seeking to dismiss without prejudice 'such terms and conditions as the court deems proper.' • • •
>
> "The judicial discretion of the trial court in permitting a plaintiff to dismiss his suit under rule 41 after answer is filed does not extend to a refusal to apply well-settled principles of law to a conceded or undisputable state of facts. • • •
>
> "Since rule 41 is declaratory of a long established practice in the courts and is intended only to clarify and make definite that practice, it should be construed with reference to the precedents. Prior to the adoption of the Rules of Civil Procedure the Supreme Court and the inferior federal courts had applied the rule in the cases cited supra and in many other cases. The decisions were reviewed at length by Judge Kenyon in United Motors Service v. Tropic-Aire, supra [57 F. 2d 479], wherein he said that the question to be determined upon appeal from an order granting a dismissal without prejudice after trial at the instance of the plaintiff is: 'Did defendant lose any substantial right by the dismissal?' [57 F. 2d 482.] That, in brief, is the issue on the present appeal.
>
> "The defendant contends that it lost (1) its adjudicated right to the payment of costs, and (2) its alleged right to freedom from suit in another court upon the same cause of action. • • •
>
> "The order of dismissal without prejudice upon the application of plaintiff should have been conditioned upon the payment of costs. See McCann v. Bentley Stores Corp., D. C. Mo., 34 F. Supp. 234; United States v. Lyman, 1 Cir., 125 F. 2d 67.
>
> "The defendant's second contention is that a dismissal without prejudice will deprive it of its alleged right to freedom from suit in another court upon the same cause of action. The defendant does not have such an absolute right under the rule."

Perhaps the clearest expression of the significance of Rule 41(a)(2) and of the considerations to be weighed in its application is to be found in a very recent dissenting opinion by Circuit Judge Woodrough, in *Federal Sav. & Loan Ins. Corp.* v. *Reeves,* 148 F. 2d 731 (C. C. A. 8th 1945). In that case, plaintiff petitioned for a writ of mandamus directing the respondent judge to grant its motion to dismiss its action without prejudice. The decision of the majority went upon the ground that since Rule 41(a)(2) vests a judicial discretion in the District Court, mandamus cannot properly issue. Petitioner in the instant case does not question the correctness of the majority opinion in the cited case on the issue of the appropriate use of a writ of mandamus; petitioner quotes from the dissenting opinion only for its analysis of the proper interpretation of Rule 41(a)(2). That opinion states (p. 733):

> "The question is of far-reaching importance. The right of plaintiff to dismiss without prejudice before trial is a peculiar one which has persisted a very long time and survived many codifications and attacks. It has endured as a refuge for the weak in the hour of their confrontation with the ordeal of trial. The right is in essence of the same nature as the right of trial by jury. Both are practical means, from wisdom and experience, tending to palliate inequality of position between litigants.
>
> "*Certainly there is nothing in the rule declaring that the traditional right of plaintiffs to dismiss without prejudice before trial shall be abolished. Whether such a long-cherished right of plaintiffs could be substantially impaired by mere rules of court need not be gone into. It is clear the rule-makers recognized the right as continuing and had no thought to abrogate it.* As we pointed out in Home Owners' Loan Corporation v. Huffman, 8 Cir., 134 F. 2d 314, the rule is merely declaratory of long-established practice. The facts in that case illustrated the abuse of the right of plaintiffs which the rule is designed to prevent. Plaintiffs who have court costs piled up against them for which they are liable but will not pay, are prevented by the rule from taking their claims out of the court and perhaps

into some other forum except under court orders and on proper terms in the court's discretion respecting satisfaction of their costs. They may be required to pay such costs in whole or part, forthwith or on terms, and the discretion is to get the costs paid but to preserve the plaintiffs' right consistently with compelling their payment. As the exercise of the right to dismiss always and universally left the plaintiff indebted for the taxable costs, the interpretation we gave the rule in the Huffman case affords means to make plaintiffs do what they were legally obligated to do, and no substantial right was denied them by that interpretation.

"I think the contrary interpretation and application in this case is not in accord with the true intendment of the rule. The 'proper conditions' of dismissal referred to in the rule do not include every condition that may appeal to a federal judge as an individual. They mean 'conditions' compatible with the maintenance of the right of plaintiffs to dismiss at their costs, substantially as it is, and traditionally has been recognized in state statutes and in the practice of the courts, including the federal courts." [Italics ours.]

In the instant case, the Circuit Court of Appeals for the Third Circuit thought it was relegated merely to a determination of whether there was a "clear abuse" of discretion by the District Court. An appellate court is not so limited. The facts are as fully before this court as they were before the District Court and, even apart from the question of whether there was a "clear abuse" of discretion by the District Court, it is respectfully submitted that this court may exercise its independent discretion on the facts.

See *In re A. Roth Co., Inc.*, 125 F. 2d 396 (C. C. A. 7th 1942), wherein the court stated (p. 398):

"Determination of abuse of discretion involves the exercise, by us, of sound judgment upon the facts. If there is controversy as to facts, and if the facts themselves largely define the wisdom of the discretion, review by the appellate court is seldom effective and it should not be. Then appellate court's review does not include trial court's discretion.

> "If, however, the facts are not in dispute and it is a question of sound judgment based upon the undisputed facts which are before us as fully as before the trial judge, we are in about as good a position as he to say whether the discretion has been wisely exercised. In short, both trial and appellate courts have the same situation upon which to exercise the same sound judgment."

Finally, the problem of interpretation of Rule 41 herein involved is peculiarly of the type requiring the exercise by this court of its power of supervision to see that justice is done. The District Court has applied one of the rules promulgated by this court in such a manner as to effectuate a confiscation of plaintiff's fortune. Perhaps the rules *can* be tortured and twisted into a technical construction which would justify the action taken in the instant case. But if that be so, then it is respectfully submitted that this court should grant relief from rules promulgated by it which have enabled such a result to be achieved.

See *In re Barnett*, 124 F. 2d 1005 (C. C. A. 2d 1942), wherein the court stated (p. 1010):

> "But adherence to a stricter procedure in such cases seems to us to derive from an excessive veneration for what Wigmore and others have properly criticized as the 'sporting theory of justice.' * * *
>
> "That theory stems from the original function of trials in courts as substitutes for private wars. That function, to be sure, is still of prime importance. * * * But we think that courts, in civilized communities, should do more than decide cases, one way or another, without regard to considerations of justice, merely to prevent private brawls and breaches of the peace. Government having, through its courts, established, in large areas, a monopoly of dispute-deciding, should try, as far as possible, to decide cases correctly—both by ascertaining the actual facts, as near as may be, and then by applying correct legal rules in an effort to do justice to the parties affected by their decisions. And not merely the parties, but the public as well, are interested that justice shall be done. The Supreme Court

has said that 'a trial in court is never * * * "purely a private controversy * * * of no importance to the public."' While the obligation to do justice does not mean, of course, that courts can act ad lib, the fact that such tribunals are called 'courts of justice' is surely not without any significance. We should no longer look upon a lawsuit as if it were 'in the nature of a cock-fight,' so that 'the litigant who wishes to succeed must try and get an advocate who is a game bird with the best pluck and the sharpest spurs.'"

POINT IV

Judge Smith's order of June 9, 1944, was erroneous and prejudicial.

If Judge Smith's order of June 9, 1944, constituted an anticipatory decision of the motions under Rules 41(a)(2) and 41(b) thereafter made before Judge Lederle, it was clearly erroneous. If it did not, it was clearly prejudicial.

If Judge Smith's order was an anticipatory decision of motions thereafter made before Judge Lederle, the error involved is obvious. Until the motions were made and until the defendant had presented to the court his proof demonstrating that he would sustain non-obviatable prejudice or damage as a result of a dismissal, voluntary or involuntary, the court was in no position to exercise any discretion or to determine whether such motions, when made, should be granted with or without prejudice.

If, on the other hand, Judge Smith did not, by his order, intend to dismiss this action with prejudice in the event that any motion for a dismissal were thereafter to be made, but was merely making a statement which was to constitute a recommendation to any judge before whom such motion might subsequently be made, then Judge Smith's statement was highly prejudicial to petitioner and inevitably affected the consideration given to his motion when it was thereafter actually made before Judge Lederle.

Conclusion

It is therefore respectfully submitted that this case is one calling for the exercise by this court of its supervisory powers, by granting a writ of certiorari and thereafter reviewing and reversing said decision.

Respectfully submitted,

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(33)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

No. 373

WALTER H. DUISBERG,
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JAMES E. MARKHAM, as Alien Property Custodian,
Respondent and Appellee below.

ADDITIONAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Supplementing the brief heretofore filed herein, petitioner respectfully submits:

POINT V

The application of Rules 41(a)(2) and 41(b) in this case violated the due process clause of the Constitution.

Article V of the Amendments to the Constitution of the United States provides that "no person shall * * * be deprived of * * * property, without due process of law."

If Rules 41(a)(2) and 41(b) are susceptible of the interpretation placed upon them in the instant case, then they constitute a clear violation of the foregoing constitutional provision, inasmuch as, thus interpreted, they effectuate a confiscation of plaintiff's property.

A statute (and *a fortiori* a rule of court) will not be construed so as to make its application violative of the Constitution, where it is capable of a construction which would make its application not violative of the Constitution. As has been shown in the preceding points, the interpretation given to Rules 41(a)(2) and 41(b) prior to the decision in the instant case did *not* bring those Rules into conflict with constitutional limitations.

By interpreting Rules 41(a)(2) and 41(b) as sanctioning a dismissal with prejudice *only* in cases of non-obviatable prejudice, the Rules can be saved from conflict with the constitutional prohibition against deprivation of property without due process of law.

Therefore, petitioner respectfully submits that the Rules should in this case be given a construction consistent with the Constitution, and that a dismissal with prejudice of an action wherein there was no non-obviatable prejudice should not be sanctioned.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 373

WALTER H. DUISBERG, PETITIONER

v.

JAMES E. MARKHAM, AS ALIEN PROPERTY CUSTODIAN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The orders appealed from, issued by the district court without opinion, appear in the record (R. 14a, 154a). The opinion of the circuit court of appeals (R. 73) is reported in 149 F. (2d) 812.

JURISDICTION

The judgment of the circuit court of appeals was entered on May 25, 1945. The petition for writ of certiorari was filed on August 24, 1945. The jurisdiction of this court is invoked under Section 240 (a) of the Judicial Code, as amended.

STATUTE INVOLVED

The action herein was brought pursuant to Section 9 (a) of the Trading with the Enemy Act (40 Stat. 411, as amended by Section 301 of the First War Powers Act, 1941 (55 Stat. 839, 50 U. S. C. Appendix, § 616).

QUESTIONS PRESENTED

(1) Whether the district court abused its discretion in denying the petitioner a continuance from June 21, 1944, the date set for trial after prior delays, until the Fall Term which commenced in November.

(2) Whether the district court abused its discretion in dismissing the complaint with prejudice when the petitioner refused to proceed to trial after his application for a continuance was denied.

STATEMENT

By Vesting Order No. 33 (R. 52) [1] of June 30, 1942, the Alien Property Custodian of the United States, pursuant to Section 5 (b) of the Trading with the Enemy Act, as amended, and pursuant to Executive Order No. 9095 of March 11, 1942 (7 F. R. 1971), vested all of the outstanding shares of General Dyestuff Corporation upon the finding that they were "property of nationals of a foreign country" as defined in Executive Order No. 8389 (5 F. R. 1400, as amended, 6 F. R. 2897). The petitioner was the registered owner of 1,975 of the shares vested. On June 3, 1943 (R. 1a), he filed this action against the Custodian, seeking the return of the shares and damages for the alleged wrongful taking. After determination of a prelimi-

[1] Record references to the petitioner's appendix in the court below (designated by the petitioner herein as "Record Part I") are cited by the use of the letter (a) after the page number, since the pages in that appendix are so marked; record references to the respondent's appendix in the court below (designated by the petitioner herein as "Record Part II") are cited by page number alone.

nary motion testing the sufficiency of the complaint (R. 1a, 1–4), issue was joined on March 18, 1944, when the defendant filed his answer denying that the plaintiff was the beneficial owner of the stock (R. 1a, 9a). The case was listed on the trial calendar for the April 1944 Term (R. 1a) in accordance with the district court rules, and counsel were advised to answer the call on April 4, 1944 (R. 120a–121a). On that day the petitioner's counsel had the case marked "Ready, not before May 15, 1944" (R. 1a, 89a). During the latter part of April or early in May, the United States Attorney orally informed the petitioner's counsel that the Government planned to move the case for trial during the month of June (R. 25–26, 38, 89a). And in two letters to the petitioner's counsel dated May 19 and May 22 the United States Attorney stated his intention to move that the trial be set for June 12 (R. 4, 5). On May 26 the Clerk of the District Court advised counsel for both parties that the trial date had been set for June 19 (R. 7). On June 5, during the course of the argument on an interlocutory motion, the petitioner's counsel intimated for the first time that he could not be ready for trial on the date fixed (R. 22). Since a judge from a different district had been designated to hear the case, the senior district judge arranged for a hearing before Judge Smith to have a definite date fixed (R. 35). Judge Smith heard both parties fully on June 9, considered the petitioner's affidavits and extended the trial date two days to June 21 (R. 45). The court's order pro-

vided that the case would be dismissed with prejudice if the petitioner should not proceed at that time (R. 14a–15a).

On June 16 the petitioner filed a notice of motion to adjourn the trial of the case until the Fall Term (R. 18a). After a full hearing lasting most of two days (June 20–21) (R. 59a–144a), Judge Lederle denied the motion for a continuance (R. 142a, 143a, 153a), denied the petitioner's further motion to "discontinue without prejudice" (R. 139a, 143a), and upon being informed by the petitioner's counsel that he would not proceed with the trial, granted the respondent's motion to dismiss the complaint with prejudice (R. 141a, 143a, 154a).

Numerous reasons were assigned for the continuance. They included the claim that petitioner had been unaware until the eve of trial that the issue in the case was whether the beneficial owner of the stock was I. G. Farbenindustrie, A. G., of Germany (R. 27, 40, 49, 22a, 52a, 63a); that the petitioner's private secretary had undergone an operation for appendicitis on May 21 and that her presence was indispensable for the preparation of the trial (R. 23, 48, 23a, 77a); that the respondent's various motions had interfered with the petitioner's preparation for trial (R. 47, 23a, 51a, 68a); that there had been an extensive turn-over of attorneys in the office of the petitioner's trial counsel (R. 51, 26a, 69a); that the petitioner's trial counsel had spent much time in other court engagements and as counsel to a Congressional committee (R. 26a); and that necessary wit-

nesses had not yet been located and evidence was still to be obtained abroad (R. 52a, 24a, 77a). Both Judge Smith on June 9 and Judge Lederle on June 21 concluded that the petitioner had failed to justify the continuance sought (R. 45, 143a). And Judge Fake had notified the petitioner's counsel on May 29 that he "wouldn't permit" an adjournment until the Fall (R. 34).

Petitioner failed to seek any shorter continuance than the 140 days between June 21 and the Fall Term which began on November 7, and rejected the suggestion that the trial be commenced and an adjournment be taken in the course of the trial if the need for additional time for preparation should be established (R. 33).

On appeal, the circuit court of appeals affirmed the judgment of dismissal (R. 74).

ARGUMENT

Turning on the peculiarities of its facts, this case raises no question of general importance. Moreover, the narrow questions it does present were clearly decided without error by both courts below, and without creating any conflict with decisions of other courts.

It is not disputed that the granting of a continuance is a matter within the discretion of the trial court, which must necessarily be empowered to "control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Landis* v. *North American Co.*, 299

U. S. 248, 254. A district court's "evaluation of the parties' diligence carries almost commanding weight" see *United States* v. *Pacific Fruit and Produce Co.*, 138 F. (2d) 367, 371–372 (C. C. A. 9), and unless there has been a clear abuse of discretion, the judgment will not be reversed. See *Franklin* v. *South Carolina*, 218 U. S. 161, 168; *Avery* v. *Alabama*, 308 U. S. 444, 446; *Gilbert* v. *Lachapelle*, 127 F. (2d) 750, 751 (App. D. C.).

The record shows irresistibly that there was no abuse of discretion in concluding—as Judge Fake, Judge Smith and Judge Lederle all did—that the petitioner failed to make out a case for a continuance from the June trial date to the Fall Term of court. Some of the grounds assigned for the delay sought (the petitioner's unawareness that the issue in the case was whether the beneficial owner of the stock was I. G. Farbenindustrie, A. G., of Germany, and interference with the petitioner's preparation for trial by the respondent's various motions) were baseless in fact; others (the illness of the petitioner's private secretary and the turnover of attorneys in the office of the petitioner's counsel) were on their face inadequate; the remainder (time consumed by other engagements of the petitioner's trial counsel, and the necessity of securing testimony abroad and locating new witnesses) appear to be afterthoughts.

Since the district court had not abused its discretion in refusing the plaintiff's application for a continuance until the Fall Term, it committed no error in dismissing the case with prejudice when the pe-

titioner refused to proceed to trial. If the court had bowed to the petitioner's intransigence by permitting a voluntary nonsuit, it would have nullified its own order denying the continuance. The petitioner would have been able to take a fresh start whenever it suited his purpose, thereby obtaining the adjournment which the court properly denied. On the other hand, if the petitioner had proceeded to trial in accordance with the court's ruling, he would have preserved the right to seek redress in the appellate court by a showing that the denial of a continuance prevented him from having a fair hearing. *Gilbert* v. *Lachapelle*, 127 F. (2d) 750, 752 (App. D. C.). Moreover, under Rule 41 of the Rules of Civil Procedure, a plaintiff may no longer, as a matter of right, discontinue without prejudice once issue is joined. See *American National Bank & Trust Co.* v. *United States*, 142 F. (2d) 571, 572 (App. D. C.); *Delahanty* v. *Newark Morning Ledger Co.*, 26 F. Supp. 327, 328 (D. N. J.). Rule 41 (b) not only recognizes that dismissal with prejudice in such situations is, like refusal of a continuance, a matter within the discretion of the trial court, but explicitly provides that dismissal "for failure . . . to prosecute or to comply with . . . any order of court" operates as an adjudication upon the merits "unless the court in the order . . . otherwise specifies."

In a supplemental brief, the petitioner has made the additional contention that dismissal with prejudice upon his refusal to proceed to trial after denial of his motion for a continuance, violated the due

process clause of the Constitution. To support this contention, the petitioner must show that there was such an abuse of discretion in the application of Rule 41 as to constitute denial of a fair trial. See *Franklin* v. *South Carolina*, 218 U. S. 161, 168; *Avery* v. *Alabama*, 308 U. S. 444, 446; *Seaboard Air Line* v. *Koennecke*, 239 U. S. 352, 354. The record shows no such denial. On the contrary, it establishes that the petitioner, who himself initiated the suit, was given a most generous opportunity to present his case, but refused to go to trial at all except upon his own terms.

The circuit court of appeals was "convinced, after a careful inspection of the record, that there has been no abuse of discretion here." Six judges have thus passed upon the petitioner's contentions. The petition shows no reason for further review by this Court.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition should be denied.

HAROLD JUDSON,
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HERBERT WECHSLER,
Assistant Attorney General.

SEPTEMBER 1945

U. S. GOVERNMENT PRINTING OFFICE: 1945

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REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT

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Correction

The "Jurisdictional Statement," at page 5 of the petition herein, by typographical error, gives the date of the Circuit Court's affirmance as May 25, 1944, whereas it actually was May 25, 1945 (R. 74).

Questions Presented

The respondent's brief, submitted as an answering brief, is not in fact such. It does not in any respect attempt to answer the questions presented by petitioner as reasons for the allowance of a writ.

Respondent completely ignores the questions presented by petitioner and undertakes to state his own questions and then answer them to his own satisfaction. Such action on the part of a respondent is strong indication that there *is* no answer to petitioner's contentions.

The questions which petitioner presented (petition, p. 6) as justifying the issuance of a writ may be summarized as follows:

1. Whether the denial of petitioner's motion under Rule 41(a)(2) was improper;
2. Whether the granting of respondent's motion under Rule 41(b) was improper; and
3. Whether Judge Smith's anticipatory order dismissing the complaint was improper.

Although petitioner believes that the action of the District Court in denying a continuance was improper, petitioner expressly refrained from presenting any question concerning the propriety of that action as a reason for the allowance of a writ. This was made so clear in the petition and in the supporting brief that it could not have been misunderstood.

At page 7 of his petition, petitioner specifically stated:

> "*Petitioner does not advance error in that respect [the denial of a continuance] as a reason for this application for a writ of certiorari.*"

And again, at page 10 of his brief, petitioner specifically stated:

> "*But petitioner does not advance error in that respect [the denial of a continuance] as a reason for this application for a writ of certiorari.*"

In applying for a writ, petitioner recognized that this Court does not ordinarily grant certiorari merely to re-

view the propriety of a District Court's action in denying a continuance. He therefore deliberately and unmistakably refrained from arguing the "continuance question," and predicated his petition squarely upon the question of the propriety of the District Court's action with respect to the motions made under Rules 41(a)(2) and 41(b).

Although petitioner specifically and repeatedly stated that he was not advancing error with respect to the "continuance question" as a reason for his application for a writ, respondent (p. 2) informs this Court that the questions presented are:

> "(1) Whether the district court abused its discretion in denying the petitioner a continuance from June 21, 1944, the date set for trial after prior delays, until the Fall Term which commenced in November.
>
> "(2) Whether the district abused its discretion in dismissing the complaint with prejudice when the petitioner refused to proceed to trial after his application for a continuance was denied."

Both of the foregoing questions present the denial of a continuance as the fundamental error, whereas none of the three questions presented by petitioner as reasons for the allowance of a writ rested in any sense upon the propriety or impropriety of the District Court's action in denying a continuance.

Petitioner, of course, realizes that if the questions presented by him do not properly arise from the facts in the case or if the determination of the questions presented by him necessarily depends upon the prior determination of a primary question which he fails to mention, it would be quite proper for respondent to call such matters to this Court's attention and to indicate a proper rephrasing of the "Questions Presented." That situation does not exist here.

Respondent has arbitrarily *scrapped* the three questions presented by petitioner—although they properly

arise from the facts in the case and although no prior decision upon any primary question is required for their determination—and has *substituted* two questions of his own, the first of which could be answered in the negative without in the slightest degree affecting an affirmative answer to the three questions presented by petitioner, and the second of which does not properly arise from the facts in the case, since it ignores the making of plaintiff's motion for a voluntary dismissal under Rule 41(a)(2) and since it ignores the question of whether any non-obviatable prejudice has been shown.

In short, no issue has been joined by the submission of respondent's brief.

Although, as indicated above, the first question propounded by respondent could be answered in the negative without militating in any way against the granting of a writ, *petitioner has no desire to run away from the "continuance question."* As petitioner stated at pages 6-7 of his petition and at page 10 of his brief, he believes that the District Court committed a grave abuse of judicial discretion in denying the application for a continuance, and he has asked that, *if* this Court *does* grant certiorari, he be permitted to present to this Court the propriety of the District Court's action on the "continuance question."

The petition summarizes the salient aspects of the proceedings in the District Court, from which it appears that between the day when issue was joined by the filing of defendant's specifications (in lieu of an amended answer), and the day when the complaint was dismissed with prejudice, only twelve days elapsed, including two Sundays. Of those ten working days, theoretically available to plaintiff for preparation for trial, eight days were consumed in defendant's examination before trial of one of plaintiff's principal witnesses and in defendant's discovery and inspection, at the offices of plaintiff's counsel, of a 24-foot pile of documents (R. 23a-25a, 49a-51a, 58, 62, 68-70).

Respondent, without contradicting any of the foregoing facts, or of the many other facts recited in the petition, contents himself with the remark that petitioner "was given *a most generous* opportunity" to prepare for trial. Respondent's concept of "generosity" is erroneous.

Respondent's attorney conceded that the facts constituting the proof of the issues in this case "are extremely complex" (R. 84a). The complexity of the case was such as to require respondent to expend three months in the preparation of its motion and amended motion to dismiss the complaint and the District Court to expend seven months in the consideration and decision of that motion—a total of ten months (R. 1a-2a). Respondent conceded that the case involved "the most important properties * * * monetarily" which the Alien Property Custodian had taken over in the war (R. 80a). It was conceded that the trial would last between three weeks (defendant's estimate, R. 36) and seven weeks (plaintiff's estimate, R. 69a-70a). The importance of the case and the anticipated length of the trial were such as to require the assignment of a judge from Michigan for the special purpose of hearing this single case (R. 83a-84a, 22-24, 35-36).

In such a case, a net of two working days within which to prepare for trial is *not* "most generous." It *was* a grave abuse of judicial discretion for the District Court to deny a continuance under the circumstances above stated. But since it is not the ordinary practice of this Court to grant certiorari for an abuse of discretion with respect to the denial of a continuance, petitioner did not present to this Court a question as to that abuse of discretion.

Since this Court may ultimately, upon a review of the judgment herein after granting certiorari, take cognizance of the "continuance question," it should be noted that respondent's statement of that question is unfair. Respondent (p. 2) refers to an application for "a continuance from June 21, 1944, the date set for trial *after prior delays.*" The *only* date previously set for the trial had been *June 19, 1944,*

which had been set on respondent's *ex parte* application (R. 3a, 108a). The so-called "prior delays" can refer only to that delay of two days. But even that delay is not chargeable to petitioner. Without any application therefor by petitioner (R. 35), the Court, of its own initiative, called the attorneys for both parties before it (R. 35), and entered an order changing the trial date to June 21, 1944, peremptorily against petitioner (R. 3a, 14a-15a, 45).

Respondent's "Questions" were manifestly inserted for the sole reason that they are questions which respondent thinks he can answer, and because respondent recognizes his inability to answer those presented by petitioner.

The first question presented by petitioner is whether the District Court improperly denied petitioner's motion, made prior to the commencement of trial, for a voluntary dismissal under Rule 41(a)(2). Respondent ignores that question completely. In his "Argument" respondent similarly completely ignores Point I of petitioner's brief and the thirteen cases there cited.

Respondent wishes this Court to believe that the question is whether it was an abuse of discretion to dismiss the complaint with prejudice "when the petitioner refused to proceed to trial." If the District Court had granted petitioner's motion under Rule 41(a)(2)—as it should have done, there having been no non-obviatable prejudice—the situation of petitioner "refusing to proceed to trial" could never have arisen. Respondent's effort to make it appear that the latter question is the one presented to this Court is placing the cart before the horse.

Respondent's "Questions" cannot be justified as a paraphrase of the second question presented by petitioner, because respondent's "Questions" do not embrace the distinction drawn by petitioner between a situation where there is non-obviatable prejudice and a situation where the prejudice is obviatable.

Respondent completely ignores the third question presented by petitioner, which disputes the propriety of Judge Smith's anticipatory order dismissing the complaint.

Respondent has chosen to argue questions not presented as reasons for the allowance of a writ, and to ignore those which have been presented.

Respondent's brief could not have been farther afield from the issues herein if it had been a brief written in another case. In fact, the footnote at the base of page 2 of respondent's brief appears to have been lifted bodily from a brief filed by the government in some other case, since it refers to matter "designated by the petitioner herein as 'Record Part I,'" and matter "designated by the petitioner herein as 'Record Part II,'"—record references which do not appear anywhere in the papers filed by petitioner.

Statement of the Matter Involved

Respondent's "Statement" (pp. 2-5) contains many inaccuracies. Since the entire "Statement" was manifestly written with an eye to its effect in connection with respondent's "Questions," most of those inaccuracies cease to be significant upon an understanding of the questions actually presented.

Some of respondent's inaccurate statements, however, cannot be ignored. One of these is the statement at page 3 of his brief, as follows:

> "On that day [April 4, 1944] the petitioner's counsel had the case marked 'Ready, not before May 15, 1944' (R. 1a, 89a)."

That statement is untrue. The references to the record do not support it. The truth is that the case was so marked, *not by petitioner's counsel, but by respondent's counsel.* Unfortunately, the record does not show who did so mark it.

Respondent's "Statement" (p. 5) also seeks to convey the impression that petitioner insisted upon a continuance of 140 days and refused to take anything less. The record reference given by respondent establishes that his attorney, as well as petitioner's, understood that petitioner's request was "that this case be put over until some time after Labor Day" (R. 34; 27a). In other words, the continuance requested was for 70 days, and not for 140 days. But even if petitioner *had* sought a continuance of 140 days, it is a decidedly strange argument that a party who has sought too long a continuance should, for that reason, be denied any, even though he is clearly and justly entitled to some.

Respondent's "Statement" (p. 5) further attempts to pollute the waters by asserting that petitioner "rejected the suggestion that the trial be commenced and *an adjournment be taken* in the course of the trial if the need for additional time for preparation should be established (R. 33)."

Examination of the record page cited by respondent will show that the Court made no such offer and that petitioner rejected no such suggestion. The Court's suggestion *actually* was that the case proceed on June 19, 1944, and that the Judge then "take a recess for some days." In view of the fact that Judge Lederle was brought on from Michigan to try this one case, such statement could not have meant, and was not understood to mean, that any recess for an extended period would be granted. At most it meant, and was understood to mean, a recess for two or three days. A recess of two or three days during the course of trial would not have had any appreciable effect upon petitioner's ability to prepare a million-dollar seven-weeks case for trial, and the offer of such recess did not alter the fact that petitioner was the subject of an attempt to force him to trial without adequate opportunity to prepare therefor.

Argument

Respondent opens his argument by stating (p. 5): "Turning on *the peculiarities of its facts,* this case raises no question of general importance." Had the issue presented to this Court been—as respondent apparently wishes to believe it is—the question of whether the District Court properly denied a continuance, then it might well have been said that the decision of the case rested on its own particular facts and raised no question of general importance.

But the question presented on this application for a writ *is not* whether a continuance was properly or improperly denied. The question presented on this application for a writ *is* whether it is an abuse of judicial discretion, and whether it constitutes a denial of due process of law as guaranteed by the Constitution of the United States, to dismiss an action with prejudice, before the commencement of trial, where plaintiff moves for a voluntary dismissal under Rule 41(a)(2) and no non-obviatable prejudice is shown.

That question does not arise out of the "peculiarities" of the facts of this particular case. It has arisen many times in other cases and—as was indicated in Point I of petitioner's main brief herein—prior to the decision in the instant case, it had been uniformly held by the District Courts that the correct interpretation of Rule 41(a)(2) *requires* the granting of plaintiff's motion for a voluntary dismissal under such circumstances. The proper interpretation of a rule promulgated by this Court clearly *does* present a question of general importance, more particularly where a District Court has departed from the correct principle of interpretation theretofore uniformly followed by the other District Courts.

Respondent's brief cites eight cases, none of which stands for the proposition for which it is cited.

Respondent (p. 6) cites *United States* v. *Pacific Fruit & Produce Co.*, 138 F. 2d 367 (C. C. A. 9th, 1943). The opinion in that case reveals that the suit had actually proceeded to trial, and that plaintiff therein had proffered all the testimony available to it—in fact, all the testimony which it had, prior to the trial, contemplated introducing. When plaintiff discovered that its testimony was inadequate to satisfy the court, and, as the opinion states, "apparently realizing that the appellant's case was about to collapse," plaintiff moved for a dismissal without prejudice.

Even under those circumstances, and even though defendant had been put to "tremendous expense" in the preparation of its case, the court did not instantly dismiss with prejudice. Instead, the court granted plaintiff's motion to dismiss without prejudice, upon condition that plaintiff pay defendant $250 within 45 days, to reimburse defendant, in part, for its expense in preparing for trial. More than two months later, plaintiff not having paid the $250, the court entered an order dismissing the suit with prejudice.

The affirmance by the Circuit Court of Appeals, therefore, is authority only for the proposition that a plaintiff will not be granted the privilege of discontinuing without prejudice and without terms in the midst of trial. No such privilege was sought in the instant case.

Gilbert v. *Lachapelle*, 127 F. 2d 750 (Ct. App., D. C. 1942), cited by respondent (pp. 6, 7), is completely irrelevant to the question as to whether the motion in the instant case, made under Rule 41(a)(2), should or should not have been granted.

In the *Gilbert* case, plaintiff made no motion for a voluntary dismissal under Rule 41(a)(2). When plaintiff's motion for a continuance was denied, he merely declined to proceed to trial. The court was confronted with the situation of a case on its calendar, awaiting trial, which plaintiff refused to try. The court consequently had no alternative but to grant defendant's motion, under Rule 41(b), for involuntary dismissal.

Even so, there is no indication in the *Gilbert* case that if plaintiff had even requested the court to specify, in its order of dismissal, that the dismissal was to be without prejudice, the court would have declined to do so. Neither the opinion in the case nor the record on appeal indicates any application by plaintiff that the court so specify; consequently, the dismissal took the ordinary course of a dismissal under subdivision (b) of the Rule, and operated as an adjudication upon the merits.

Respondent (p. 7) cites *Delahanty* v. *Newark Morning Ledger Co.*, 26 F. Supp. 327 (D. Ct., D. N. J. 1939), for the proposition that "under Rule 41 of the Rules of Civil Procedure, a plaintiff may no longer, as a matter of right, discontinue without prejudice once issue is joined."

The *Delahanty* case was a companion case to *Sauer* v. *Newhouse*, 26 F. Supp. 326 (D. Ct., D. N. J. 1939), in which the court handed down an opinion concurrently with its opinion in the *Delahanty* case.

Reading both opinions together, it becomes clear that the *Delahanty* case did not present merely a situation of discontinuance after issue joined. The two actions were representative minority stockholder suits, which actually proceeded to trial. During the progress of the trial, negotiations were held for the purpose of settlement. In the *Sauer* case, a settlement was agreed upon; notice was given to all stockholders, pursuant to Rule 23, to show cause why the settlement should not be confirmed; no intervenors appeared; the settlement was confirmed; and the suit was accordingly dismissed with prejudice. In the *Delahanty* case, the settlement efforts were unsuccessful, and plaintiffs moved for a dismissal without prejudice; the court declined to order a dismissal without prejudice, and proffered plaintiffs the alternatives of fixing a date for resumption of the trial or of accepting a dismissal with prejudice.

The *Delahanty* case is not authority for the proposition that a plaintiff may not "discontinue without prejudice

once issue is joined." It is authority only for the proposition that a plaintiff will not be granted the privilege of discontinuing without prejudice in the midst of trial. No such privilege was sought in the instant case.

American Nat. Bank & Trust Co. of Chicago v. *United States*, 142 F. 2d 571 (Ct. App., D. C. 1944), cited by respondent (p. 7), stands only for the proposition that an order entered under Rule 41(b), dismissing an action for lack of prosecution, is a dismissal with prejudice unless the court "otherwise specifies." The case does not purport to determine the circumstances under which a court should or should not "otherwise specify."

The question, arising in a second action, was as to the nature of the dismissal in the first action. The issue before the court was what type of dismissal had been entered—not what type of dismissal should be entered.

Respondent (pp. 5-6) cites *Landis* v. *North American Co.*, 299 U. S. 248 (1936), for the proposition that "It is not disputed that the granting of a continuance is a matter within the discretion of the trial court, which must necessarily be empowered to 'control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants.'" Even apart from the fact that the "continuance question" is not presented on this application for a writ, the quotation has been taken out of its context. The question actually presented in the cited case was whether defendant's application for a stay should be granted in an action where the question of constitutionality of the statute involved was being litigated against the government in a series of forty-seven other actions pending in thirteen districts. The quoted words had nothing to do with the question of continuance, and of course nothing to do with Rule 41.

Respondent (pp. 6, 8) cites *Franklin* v. *South Carolina*, 218 U. S. 161 (1910), *Avery* v. *Alabama*, 308 U. S. 444

(1940), and *Seaboard Air Line Ry.* v. *Koennecke,* 239 U. S. 352 (1915), upon the "continuance question" and upon the applicability of the due process clause to the interpretation of Rule 41. The "continuance question" is not presented on this application for a writ, and the cited cases have nothing whatsoever to do with Rule 41.

Respondent (pp. 6-7) argues that if a continuance is properly denied, it necessarily follows that a dismissal without prejudice may not thereafter be granted. Respondent's argument is a *non sequitur.* The District Court could have permitted a voluntary nonsuit and, as a condition thereof, imposed appropriate terms. The imposition of terms, compliance wherewith would have been a condition precedent to the commencement of a second suit, would not have been tantamount to the granting of a continuance, because such terms would not only have penalized the plaintiff, but would also have compensated the defendant for any damages resulting from the voluntary dismissal—a situation which would not have existed if the continuance had been granted.

No non-obviatable prejudice has been asserted.

The whole essence of petitioner's argument to this Court is that, when a motion is made under Rule 41(a)(2) before the commencement of trial, a dismissal with prejudice is justified only in the presence of non-obviatable prejudice.

We cannot conceive how this question could have been presented more clearly than it was in petitioner's brief. Respondent knows that this is the question in the case, and nevertheless makes no effort in his brief to show any non-obviatable prejudice. That is a tacit admission that none existed. If none existed, the dismissal with prejudice was an error of law which this Court should correct.

As a matter of justice and equity, the error below should be corrected.

The injustice of the denial of petitioner's motion under Rule 41(a)(2) for a voluntary dismissal of his action without prejudice is further demonstrated by a study of the vesting order under which petitioner's stock was expropriated, and of the proceedings subsequent to such vesting order.

The total number of outstanding shares of the capital stock of General Dyestuff Corporation was 8,678; these shares were owned by eleven different persons (R. 53). All of these shares, including petitioner's, were vested in respondent by a single vesting order (R. 52-53). This vesting order sets forth the same ground for the vesting of all the stock. Suits were instituted by petitioner and other stockholders, seeking recovery of over 90% of the outstanding shares thus expropriated. All of the cases involved the same legal and factual issues.* In none of the cases was it made clear whether respondent contends that the stockholders were trustees for the asserted beneficial owner, or whether the interest of the asserted beneficial owner results from the existence at various times of options giving such asserted beneficial owner a right to purchase such shares upon the payment of $100 per share plus interest.

Since the dismissal with prejudice of petitioner's complaint in the instant case, *respondent has purchased their entire holdings from all of the other stockholders who had commenced suit for the recovery of their shares, and has paid them the sum of $118 per share, which represents the option price of $100 per share plus interest.* In other words, the stock of holders of 5,903 shares has

* "The instant case is but one of eight cases involving the same legal and factual issues now pending in the three different judicial districts." (Affidavit of James E. Markham, filed in *Bonnar* v. *Markham*, D. Ct., S. D. N. Y. 1944, Civil No. 24-462.)

now been purchased by the government, although the shares were vested by the same order, for the same reasons, and were the subject of the same causes of action, to which respondent interposed the same defenses. These facts show the merit of petitioner's claim.

Where other stockholders, whose claims were on a par with petitioner's, have been paid the option price plus interest for their stock in settlement of their suits commenced upon expropriation by the government, it is unconscionable that petitioner should be deprived of his property without compensation and without trial because of an asserted lack of diligence in preparing for trial. The judgment below unjustly enriches the respondent.

Conclusion

It is therefore respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, by granting a writ of certiorari and thereafter reviewing and reversing said decision.

Respectfully submitted,

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